

This appeal by the plaintiff, on whose death, during pendency of the appeal, the present appellants being the heirs and on whom right to sue survives, were brought on record, is directed against the judgment and decree dated 18th January, 2000 passed by the learned Civil Judge (Sr. Division), Lakhimpur at North Lakhimpur in Title Appeal No.5/1996, whereby and whereunder the appeal preferred by the defendant Nos.1 and 2 in Title Suit No.49/1985, has been allowed by setting aside the judgment and decree dated 7th June, 1996 passed by the learned Civil Judge (Jr. Division), Lakhimpur at North Lakhimpur in Title Suit No. 49/1985. By the said judgment, the trial Court had decreed the suit declaring the right, title and interest in respect of 3 Bighas 1 Katha 17 2/3rd Lechas and that of the defendant Nos.1 and 2 in respect of the remaining land of 10th Bighas 0 Katha 13 Lechas and declared the joint possession.

[2] During pendency of the title appeal, the defendant No.1 died and in his place the names of his legal heirs have been substituted as the right to sue survives on them. The legal heirs of the plaintiff/ appellant were also brought on record, during pendency of the present appeal, as he died and the right to sue survived on them.

[3] The plaintiff, Murad Imam, instituted Title Suit No.49/1985 in the Court of the learned Civil Judge (Jr. Division) No.1, Lakhimpur at North Lakhimpur praying for a decree declaring right, title and interest in respect of the land measuring 4 Bighas 13 Lechas, out of the total land of 10 Bighas 13 Lechas, more fully described in schedule to the plaint and also for cancellation of the sale deeds dated 9th April, 1966 (Exhibit-2); 29th June, 1966 (Exhibit-7/Ka) and 25th September, 1967 (Exhibit-8/Kha), apart from a decree for compensation of Rs.1800/-, contending inter alia that though on 15th October, 1959 the plaintiff purchased the land measuring 10 Bighas 13 Lechas from Kasem Ali vide Exhibit-1 sale deed for a consideration amount of Rs.1,999/-, when the plaintiff came to know that 2(two) of his brothers are also pattadars, he executed a deed on 9th April, 1966 relinquishing his right in respect of the land measuring 6 Bighas in favour of the other 2(two) brothers, namely, Jamiruddin and Didaruddin and retaining the land measuring 4 Bighas 13 Lechas out of 10 Bighas 13 Lechas, possession of which was handed over to him by Kasem Ali. It has also been pleaded that while the plaintiff was possessing the said land by himself as well as through the tenants, taking advantage of his absence from 1982 to 1985, the defendant Nos.1 and 2 have dispossessed the plaintiff from the entire suit land. It has also been pleaded that subsequently on enquiry he came to know that all the 3(three) brothers, namely, Kasem, Didaruddin and Jamiruddin on 9th April, 1966 (Exhibit-2) transferred 6 Bighas of land to the defendant Nos.1 and 2, apart from executing other 2(two) sale deeds, one by Didaruddin and Jamiruddin on 29th June, 1966 (Exhibit-7/Ka) transferring 2 Bighas 3 Kathas 14% Lechas in favour of the defendant Nos.2 and the other dated 25th September, 1967 (Exhibit-8/Kha) executed by Kasem Ali in favour of the defendant No.1 transferring 1 Bigha 1 Katha 19 Lechas, thereby transferring the entire land measuring 10 Bighas 13 Lechas in favour of the defendant Nos.1 and 2, though Kasem Ali cannot transfer the land measuring 4 Bighas 13 Lechas in view of the sale deed dated 15th October, 1959 (Exhibit-1).

[4] The suit of the plaintiff has been contested only by the defendant Nos.1 and 2 by filing joint written statement. Since the other defendants have not contested the suit, the suit proceeded ex-parte against them. The defendant Nos.1 and 2 in the written statement has pleaded that there is no cause of action for filing the suit; that the suit is barred by limitation and that though Kasem Ali has executed the sale deed dated 15th October, 1959 (Exhibit-1), he being one of the co-sharer could not have sold the entire land. It has also been

pleaded that no title can be passed on the plaintiff even in respect of the share of Kasem Ali, one of the co-sharer, by virtue of the sale deed dated 15th October, 1959 (Exhibit-1) as the entire consideration amount has not been paid. The defendants have also pleaded in the written statement that the document purportedly executed by Kasem Ali on 14th November, 1959 (Exhibit-9) acknowledging receipt of the balance consideration amount for the aforesaid sale deed dated 15th October, 1959 is forged and fabricated. The further pleaded case of the defendants is that Kasem Ali, Jamiruddin and Didaruddin, the 3(three) brothers, who are the co-pattadars, sold 6 Bighas of land to the defendant Nos.1 and 2 vide sale deed dated 9th April, 1966; Jamiruddin and Didaruddin on 29th June, 1966 sold 2 Bighas 3 Katha 14% Lechas of land in favour of the defendant No.1 and Kasem Ali on 25th September, 1967 sold 1 Bigha 1 Katha 19 Lechas of land to the defendant No.1 and by virtue of such sale, the defendant Nos.1 and 2 became the owner in respect of the entire land measuring 10 Bighas 13% Lechas.

[5] Based on the pleadings of the parties, the trial Court framed the following issues for determination:-

1. Whether there is any cause of action for the suit?
2. Whether the suit is in proper form?
3. Whether the suit is barred by limitation?
4. Whether the plaintiff was dispossessed in 1982?
5. Whether the plaintiff is entitled to compensation amounting to Rs.600/- P.A.
6. Whether the plaintiff has right, title and interest over the suit land?
7. Whether the parties are joint pattadar as such who are entitled to how much land?
8. To what relief the parties are entitled?

[6] The plaintiff in order to prove his case has examined 7 (seven) witnesses including himself, apart from proving 9 (nine) documents being Exhibits-1 to 9. The defendants have also examined 4 (four) witnesses in support of their case and proved 5 (five) documents, which were marked as Exhibits-Ka to Unga.

[7] The trial Court upon appreciation of the evidence on record has partly decreed the suit of the plaintiff declaring his right, title and interest in respect of 3 Bighas 1 Katha 17 2/3rd Lechas, out of 10 Bighas 13 Lechas and that of the defendant Nos.1 and 2 in respect of the remaining land and has also decreed the joint possession of the plaintiff in respect of the said 3 Bighas 1 Katha 17 2/3rd Lechas, by holding that the right, title and interest of Kasem Ali in respect of 1/3rd of total land of 10 Bighas 13 Lechas has been transferred in favour of the plaintiff by virtue of the sale deed dated 15th October, 1959 (Exhibit-1).

[8] Being aggrieved, the defendant Nos.1 and 2 preferred the aforesaid first appeal before the first Appellate Court, which has been allowed vide judgment and decree dated 18th January, 2000 by setting aside the judgment and decree passed by the trial Court, by holding that the title in respect of Kasem Ali's share did not pass on the plaintiff by virtue of the sale deed dated 15th October, 1959 (Exhibit-1) as the plaintiff could not prove that the remaining unpaid consideration amount of Rs.1000/- has been paid to the vendor, namely, Kasem Ali.

The First Appellate Court while holding so has also held that the plaintiff could not discharge his burden to prove that Exhibit-9, money receipt dated 14th November, 1959, allegedly executed by Kasem Ali is not forged and fabricated. The first appellate Court has also held that the suit of the plaintiff is barred by time, having not instituted within 12(twelve) years from the date of execution of the sale deed dated 15th October, 1959, as the plaintiff could not prove handing over possession and subsequent dispossession thereof. Hence, the present appeal.

[9] The appeal was admitted for hearing on 16th February, 2001 on the following 2(two) substantial questions of law:-

1. Whether Ext.1 the document of title of the plaintiff was wrongly interpreted by the lower appellate court?

2. Whether the learned Civil Judge (Sr. Division) was right in holding that the plaintiff's suit was not being filed within 12 years from the date of the sale (13.10.1959) was barred by limitation?

[10] I have heard Mr. P.K. Kalita, learned counsel for the appellants and Mr. B. Banerjee, learned counsel appearing for the respondent No.9. None appears for the other respondents.

[11] Referring to the judgment passed by the First Appellate Court, it has been submitted by Mr. Kalita, learned counsel for the appellants, that since the defendants in their written statement have pleaded that Exhibit-9 money receipt dated 14th November, 1959 is forged and fabricated, the burden lies on them to prove the same and hence, the First Appellate Court has committed error of law in holding that the burden lies on the plaintiff to prove that the said Exhibit-9 money receipt is not forged and fabricated. It has also been submitted that since the sale, as defined in Section 54 of the Transfer of Property Act, is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised, even if the entire consideration amount has not been paid by the plaintiff to Kasem Ali, the vendor, the title, in so far as it relates to the share of Kasem Ali has been transferred in favour of the plaintiff by virtue of Exhibit-1 sale deed dated 15th October, 1959 and hence, Kasem Ali cannot transfer his right, title and interest in respect of his share to the defendant Nos. 1 and 2 vide subsequent sale deeds executed on 9th April, 1966 and 25th September, 1967, i.e. Exhibit-2 and Exhibit-8/Kha. The learned counsel referring to the judgments and decrees passed by the learned Courts below has also submitted that as the plaintiff could prove, by adducing oral as well as documentary evidence, including Exhibits-5 and 6 rent agreements, that the possession of the suit property was handed over by Kasem Ali in his favour on execution of the sale deed, who was subsequently dispossessed during the period from 1982 to 1985 when he was away in Bihar, the first appellate Court ought not to have held that the suit of the plaintiff is barred by time having not filed within 12(twelve) years from the date of execution of the sale deed dated 15th October, 1959, more so when the plaintiff could prove his dispossession by the defendant Nos.1 and 2 between 1982 to 1985. The learned counsel, therefore, has submitted that the trial Court has rightly decreed the suit of the plaintiff in so far as it relates to 3 Bighas 1 Katha 17 2/3rd Lechas of land and declared joint possession with the defendant Nos.1 and 2, which ought not to have been disturbed by the first Appellate Court, as has been done in the instant case.

[12] Mr. Banerjee, learned counsel appearing for the respondent No.9/defendant No.2, on the other hand, supporting the judgment and decree passed by the first appellate Court has submitted that since Kasem Ali was not the sole owner of the land measuring 10 Bighas 13 Lechas, no right, title and interest by virtue of the sale deed dated 15th October, 1959 (Exhibit-1), can be transferred in favour of the plaintiff, not even in respect of the share of Kasem Ali. It has also been submitted that since the plaintiff has executed a document on 19th October, 1959 (Exhibit-Gha) with the stipulation that unless he pays the remaining consideration amount of Rs.1,000/-, he will not take possession of the suit property and would not mutate his name in the revenue records, the burden lies on the plaintiff to prove the payment of the unpaid amount, which the plaintiff has failed to do. It has also been submitted that the defendants, on the other hand, could prove that the Exhibit-9 receipt dated 14th November, 1959 is fabricated and forged document. It has further been submitted that the first appellate

Court has rightly held that the burden lies on the plaintiff to prove that the Exhibit-9 money receipt dated 14th November, 1959 is not forged and fabricated. The learned counsel further submits that as the plaintiff could not prove handing over of possession and subsequent dispossession as alleged, the first Appellate Court has rightly dismissed the suit of the plaintiff by holding that the same is barred by time, having not instituted within 12(twelve) years from the date of execution of the sale deed dated 15th October, 1959 (Exhibit-1). The learned counsel, therefore, submits that the second appeal deserves to be dismissed.

[13] I have considered the submissions advanced by the learned counsel appearing for the parties and also perused the judgments and decrees passed by the learned Courts below. Since it is a judgment of reversal, I have also perused the evidence, both oral and documentary.

[14] There is no dispute that the land measuring 10 Bighas 13 Lechas was originally belonged to Karim Musalman, on whose death the said land devolved on his 3(three) sons, namely, Kasem, Jamiruddin and Didaruddin. It is also not in dispute that Kasem Ali alone had executed a sale deed dated 15th October, 1959 (Exhibit-1) in favour of the plaintiff transferring the entire land measuring 10 Bighas 13 Lechas for a consideration amount of Rs.1999/-, though he alone cannot transfer the entire land. The said sale deed was a registered instrument. It is also an admitted fact that the plaintiff executed a document on 19th October, 1959 (Exhibit-Gha) stipulating that he will not possess the said property unless he pays the remaining consideration amount of Rs.1000/- and would also not mutate his name on the revenue records. Execution of 3(three) sale deeds being dated 9th April, 1966 (Exhibit-2) by Kasem Ali, Jamiruddin and Didaruddin transferring 6 Bighas of land to defendant Nos.1 and 2; dated 29th June 1966 (Exhibit-7/Ka) executed by Jamiruddin and Didaruddin transferring 2 Bighas 3 Kathas 14% Lechas in favour of the defendant No.2 and dated 25th September, 1967 (Exhibit-8/Kha) executed by Kasem Ali in favour of the defendant No.1 transferring 1 Bigha 1 Katha 19 2/3rd Lechas are also not in dispute.

[15] The plaintiff claimed the right, title and interest in respect of 4 Bighas 13 Lechas of land claiming to be the share of Kasem Ali, by virtue of the sale deed dated 15th October, 1959 (Exhibit-1). On the other hand, the defendant Nos.1 and 2 have claimed that by virtue of the sale deeds dated 9th April, 1966; 29th June, 1966 and 25th September, 1967, the entire land measuring 10 Bighas 13 Lechas have been transferred by the 3(three) brothers in their favour and as such, they have acquired right, title and interest in respect of entire land measuring 10 Bighas 13 Lechas, which includes 4 Bighas 13 Lechas of land claimed by the plaintiff.

[16] As discussed above, the land measuring 10 Bighas 13 Lechas was inherited by 3(three) brothers, namely, Kasem, Jamiruddin, Didaruddin and hence, Kasem cannot transfer the land which fell in the share of Jamiruddin and Didaruddin, as has been done vide sale deed dated 15th October, 1959, transferring 10 Bighas 13 Lechas of land in favour of the plaintiff. The said sale, however, would not altogether be void and would be operative so far as Kasem's share is concerned, i.e. 1/3rd of 10 Bighas 13 Lechas.

[17] The defendants, as noticed above, have claimed that the entire consideration amount has not been paid to Kasem Ali by the plaintiff and hence, the title in respect of the share of Kasem Ali also cannot be passed on to the plaintiff. It has also been contended that Exhibit-9, money receipt dated 14th November, 1959 is forged and fabricated. Since the defendants have raised the plea that Exhibit-9, money receipt, is forged and fabricated, the burden lies on the defendants to prove that the said document is forged and fabricated. The first appellate Court has wrongly shifted the burden on the plaintiff to prove that the said document is forged and fabricated though the plaintiff has proved the said document as well as the signature of Kasem Ali in the said document. The de

fendants could not prove, by adducing any cogent and reliable evidence, that the Exhibit-9 money receipt is forged and fabricated. In any case, since sale is defined in Section 54 of the Transfer of Property Act, 1882 as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised and such sale was for a consideration amount of Rs.1999/- and is a registered instrument, in any case the title has passed on to the plaintiff in respect of the share of Kasem Ali by virtue of the said sale deed dated 15th October, 1959, even if part of the consideration amount has not been paid. The plaintiff could also prove that he was dispossessed in the year 1982 after being put to possession by Kasem Ali. The plaintiff also could prove his earlier possession through the tenants by proving Exhibis-5 and 6 tenancy agreements. The First Appellate Court, therefore, was not justified in holding that the suit of the plaintiff is barred by time, as he has instituted the suit within 3(three) years of dispossession.

[18] In view of the aforesaid discussion, the judgment and decree passed by the first appellate Court is set aside. The judgment and decree passed by the trial Court is restored. Consequently the right, title and interest of the plaintiff in respect of 3 Bighas 1 Katha 17 2/3rd Lechas out of 10 Bighas 13 Lechas of land has been decreed and that of the defendant Nos.1 and 2 in respect of the remaining land, with joint possession with the defendant Nos.1 and 2.

[19] The appeal stands accordingly allowed. The parties are directed to bear their own cost.

[20] The Registry is directed to send down the records forthwith.